
(2013) 01 DEL CK 0298

In the Delhi High Court

Case No : Arbitration Petition 113 of 2010

M/s. Anukampa Solutions Private Ltd.

APPELLANT

Vs

Uttar Pradesh State Road Transport Corporation and Others

RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Citation : (2013) 2 AD 302 : (2013) 198 DLT 69 : (2013) 135 DRJ 175

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Jayant Bhushan, with Mr. Muneesh Malhotra, for the Appellant;
Bijender Chahar with Ms. Garima Prashad, for the Respondent

Judgement

Reva Khetrapal, J.—The Petitioner has filed the present petition u/s 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the disputes between the Petitioner and the Respondent, arising out of the Agreement dated 23.11.2006 for constructing, operating, and maintaining (as BOT Project) a food stall at Ajmeri Gate Interstate Bus Terminus, New Delhi for a period of ten years by the Petitioner. Shorn of details, the facts leading to the filing of the present petition are as follows. Pursuant to the Agreement dated 23.11.2006 between the Petitioner, a Private Limited Company and the Respondent No. 1, a Public Sector Passenger Road Transport Corporation, the Petitioner started construction of the food plaza on the site and announced the date of opening of food plaza as 20.06.2007. However, the Petitioner was shocked to receive a letter dated 14.06.2007 from the Respondent No. 1 calling upon the Petitioner to stop all the work on the ground that "No Objection Certificate" from Municipal Corporation of Delhi (MCD) with regard to subject construction had not been obtained. The Petitioner, even though believed that under the said agreement no approval was to be obtained from the Municipal Corporation of Delhi (MCD), at the instance of the Respondents paid the necessary charges for approval of the site plan and the MCD finally accorded its approval on 26.12.2008.

2. The Petitioner thereafter promptly informed the Respondent regarding the said approval and requested the Respondent by letter dated 27.12.2008 to grant permission to complete the unfinished work. By letters dated 09.06.2009, 15.06.2009 and 02.07.2009, the Petitioner was permitted to start the operation of the food plaza temporarily, however, in none of these letters any issue with regard to license fee from 23.06.2007 to 26.12.2008 was ever raised by the Respondents. The Petitioner claims that after having granted permission to the Petitioner, in complete contravention of its assurances, the Respondent Nos. 2 and 3, the employees of the Respondent No. 1, approached the site and arbitrarily fixed locks on the subject premises. The aforesaid action of the Respondent No. 1 was immediately challenged by the Petitioner before the Allahabad High Court at Lucknow, where the Respondent took a U-turn and stated that they had not put any lock on the site. The said petition was disposed of by the Allahabad High Court directing the Respondent to remove the locks, if any, with immediate effect.

3. Meanwhile, on 19.09.2009 the Petitioner informed the Respondent about the completion of the construction work and opening of the food plaza with effect from the said date. Again, to the utter surprise of the Petitioner, the Petitioner received Office Order dated 24.09.2009 from the Respondent No. 1, whereunder the Respondent No. 1 abruptly terminated the Agreement dated 23.11.2006 on the ground of violation of Clauses 6, 8, 15 and 29 of the Agreement. Aggrieved by the said Order dated 24.9.2009 issued by the Respondent No. 1, the Petitioner made a representation on 25.09.2009 to the Respondent No. 1 to which the Petitioner received reply dated 03.10.2009 denying the right of hearing to the Petitioner. Accordingly, disputes arose between the parties as regards the termination of the Agreement by the Respondent-Corporation.

4. In order to resolve the disputes between the parties, the Petitioner invoked the Arbitration Clause contained in Clause 21 of the Agreement dated 23.11.2006, vide its letter dated 08.03.2010 addressed to the Managing Director of the Respondent Corporation, and upon failure of the Respondent Corporation to appoint an arbitrator in terms of the aforesaid Arbitration Clause contained in the Agreement, the Petitioner filed the present petition. It is specifically averred in the petition that the notice dated 08.03.2010 had been personally delivered to the Respondent and was sent through courier as well, but there was no response to the aforesaid notice.

5. The Respondents, in their reply, though admit the existence of the aforesaid disputes and the Arbitration Agreement between the parties, in terms of which the said disputes are required to be referred to arbitration, have denied the claims of the Petitioner in toto. The Respondents claim that the Agreement dated 23.11.2006 was rightly terminated by the Respondent-Corporation on 24.09.2009 on the ground of non-compliance with the terms and conditions contained therein by the Petitioner; and vehemently contest the prayer made in the petition for appointment of a sole arbitrator on the following three grounds.

6. First, the Respondents deny the receipt of the letter dated 08.03.2010 invoking the arbitration Clause and challenge the maintainability of the present petition on the ground that the notice for appointment of arbitrator was not received by the Respondent-Corporation. The Respondents in their reply allege that the Petitioner has sneakily tried to show that it had sent such letter to the Respondent Corporation by showing service to the Head Office of the Respondent Corporation whereas the duly authorized office for the said purpose is at Ghaziabad and at Ajmeri Gate, and the Petitioner knew fully well that the file with respect to the entire agreement is maintained at Ghaziabad which is the competent office in the present case. The Respondent states that the letter dated 08.03.2010 does not find place in the entire file or record of the Respondent-Corporation and claims that the receipts filed by the Petitioner are forged and fabricated.

7. The second plank of Respondents' argument is based on the arbitration clause contained in the agreement dated 23.11.2006, which is as follows:

21. Any dispute between the First Party and Second Party will be settled as follows:

(a) All disputes between the parties arising out or in relation to contract, shall be referred for Arbitration to the Managing Director or an officer, not below the rank of General Manager of the Corporation, and nominated and appointed by Managing Director on his behalf.

(b) The Arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason, the Managing Director shall be competent to appoint any other officer to act as Arbitrator. Such arbitrator shall be entitled to proceed with the references from state at which was left by his predecessor in office.

8. Relying upon the aforesaid clause, the Respondents' contention is that it is only the Managing Director of the Respondent Corporation or an officer not below the rank of the General Manager, nominated and appointed by the Managing Director on his behalf, who is a duly authorized and competent authority to appoint the arbitrator with respect to the disputes arising out of the contract dated 23.11.2006. It is contended that the Managing Director of the Respondent-Corporation has always been ready and willing to appoint an arbitrator as per the contract between the parties and the Petitioner has approached this Court "without following due procedure as outlined under the contract.....". No arbitrator can be appointed beyond the provisions of the arbitration Agreement between the parties.

9. Lastly, the Respondents have contended that it is the Petitioner who, instead of honouring the arbitration agreement between the parties, has been indulging in frivolous litigation before different fora.

10. During the pendency of the present petition, the Respondents placed on

record a Supplementary Affidavit dated 09.03.2011, stating therein that the Legal Section of its Ghaziabad office, vide letter dated 11.11.2010, enquired with the Head Office of the Respondent-Corporation at Lucknow as to the receipt of the alleged notice dated 08.03.2010 from the Petitioner. In response to the said enquiry, reply was received from the Head Office vide letter dated 20.11.2010, wherein it was stated that notice dated 08.03.2010 had not been received. It is further stated on oath by the Respondents that the courier receipt filed by the Petitioner does not bear the signature of the receiving authority and that the alleged "by hand" receipt does not bear the name or even the designation of the person who received the alleged notice, which is mandatory under the Rules and Regulation and is also the practice of the Respondent Corporation. It is also stated in the Supplementary Affidavit by the Respondents that there is no entry with respect to the said receipts in the Entry/Dispatch Register maintained by the Respondent-Corporation at its Head Office in its regular course of business. The Respondents have enclosed the letter dated 20.11.2010 received from their Head Office alongwith their Supplementary Affidavit.

11. In reply to the aforesaid Supplementary Affidavit, the Petitioner filed Reply Affidavit/Counter Affidavit dated 29.03.2011, reiterating on oath that the notice dated 08.03.2010 was served personally at the Managing Director's office and also through courier and denying that the courier receipts were forged and fabricated. It stated that the stand of the Respondent adopted in the alleged letter dated 20.11.2010 is only an afterthought, that the courier receipt bears the signature of the receiving authority being an independent document over which Petitioner has no control.

12. In Rejoinder Affidavit, the Respondent reiterated what had been stated by it in the Supplementary Affidavit including its assertion that the stamp on the courier receipt is a fabricated one.

13. Mr. Jayant Bhushan, learned senior counsel for the Petitioner at the outset submitted that the law was well settled in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*, which was affirmed in *Punj Lloyd Ltd. vs. Petronet MHB Ltd.*, (2006) 2 SCC 638, that once a minimum of 30 days has expired from the date of service of notice invoking arbitration and a petition is filed in the Court, the appointing authority loses the right to make the appointment. In the present case, the appointment has been made by the Respondent after two years of the filing of the present petition, and hence even if the present petition is treated as a notice to the Respondent, the Respondent has long since lost its right to appoint an arbitrator for settlement of the disputes which have admittedly arisen between the parties. He further submitted that the Managing Director in the instant case having been privy to the decision making process which resulted in the termination of the agreement between the parties, the insistence of the Respondent to appoint the Managing Director and/or its nominee to arbitrate upon the disputes between the parties would be violative of the principles of natural justice.

14. Reliance in support of the aforesaid submissions was placed by learned senior counsel for the Petitioner on the judgment of the Supreme Court rendered in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., . The observations made therein, being apposite, are reproduced hereunder:

36. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , which was affirmed in Punj Llyod Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638, it was held that once a minimum of 30 days has expired and a petition is filed to the court, the appointing authority loses the right to make the appointment. Therefore, the appellant BSNL has now lost its right to appoint any arbitrator for settling the disputes under the agreement.

37. Further, the CGM, Kerala Circle has already taken a decision as is evident from his letter dated 25-4-2006, that the appellants were right in imposing the liquidated damages and therefore, the question of such a person becoming an arbitrator does not arise as it would not satisfy the test of impartiality and independence as required u/s 12 of the Arbitration and Conciliation Act, 1996. Moreover it would also defeat the notions laid down under the principles of natural justice wherein it has been recognized that a party cannot be a judge in his own cause. The judgment of this Court in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, is significant in this matter. The Court had stated: (SCC p.161)

...Even assuming that the [terms of Clause 12 afford] scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, adjudication by the officer regarding the breach of the contract cannot be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract.

15. Learned senior counsel further emphasized that there was ample evidence on record to substantiate the contention of the Petitioner that the notice invoking Arbitration Clause had been duly served upon the Respondent. He contended that the allegation of the Respondent that the courier receipt had been fabricated by the Petitioner deserved no credence for the courier agency was an independent agency and it was impossible to imagine that the courier agency would have indulged in fabrication at the instance of the Petitioner. Alternatively, learned senior counsel submitted that a factual dispute having arisen between the parties as to whether notice was received or not which was incapable of being resolved by leading evidence keeping in view the impracticability of the whole exercise, the filing of the petition must be deemed to be notice given to the Respondent. Learned senior counsel in this context referred to the order of the Division Bench dated 17.10.2011 passed in FAO(OS) 557/2009, whereby the Petitioners had sought relief u/s 9 of the Arbitration and Conciliation Act, 1996 as a precursor to the filing of the present petition, which, though disallowed by the

learned Single Judge was granted to the Petitioner/Appellant by the Division Bench by passing the following order:-

13. We allow the appeal and set aside the impugned order dated 5.11.2009. OMP No. 601/2009 filed by the appellant stands disposed of restraining respondent No. 1 from preventing appellant to carry on business as per the agreement dated 23.11.2006 till the learned arbitrator who would be appointed would decide the dispute and needless to state the order in favour of the appellant is conditional upon the appellant paying the agreed license fee as per the agreement dated 23.11.2006 and we clarify that the license fee would be payable as per clause 6 of the agreement i.e. after 4 months of 23.11.2006. The appellant would comply with all its obligations under the agreement dated 23.11.2006. We are informed that the appellant submitted for approval of respondent No. 1 the rates at which it would sell the food stuff from the food plaza, which permission was refused, as according to respondent No. 1 it had cancelled the agreement. We thus direct the appellant to re-submit, for approval of respondent No. 1, the rate list for the food items which are sold from the premises in question and the competent authority of respondent No. 1 is also directed to exercise its power under the agreement between the parties by treating the agreement as subsisting.

14. A clarification is added by consent of learned counsel for the parties: Either party would be free to move an appropriate application u/s 17 of Arbitration and Conciliation Act 1996 before the learned arbitrator who is yet to be appointed should subsequent situation arise which needs modification of the instant order.

16. Mr. Bhushan also heavily relied upon a recent decision of the Supreme Court rendered in Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL), . In the said case, the only objection raised by the Respondent to the petition u/s 11 of the Arbitration and Conciliation Act, 1996 filed by Bipromasz Bipron Trading SA was that the disputes had to be referred to the Chairman and Managing Director of the Respondent or his nominee in terms of the Arbitration Clause contained in the General Terms and Conditions of Purchase Order (Foreign). It was submitted that the prayer made in the petition for appointment of a sole arbitrator to adjudicate the dispute was contrary to the contract and thus not maintainable. It was also the case of the Respondent that prior to the filing of the petition before this Court, the Chairman-cum-Managing Director, as sole arbitrator, had duly acted and exercised the power in appointing the General Manager of the Respondent - Bharat Electronics Limited, as the arbitrator and communicated the same by fax on the same day. The Respondent having accepted the Arbitration Clause with open eyes could not be permitted to avoid the same on the ground of perceived partiality. Per contra, learned senior counsel for the Petitioner submitted that the disputes cannot be referred to the CMD or his nominee as the Petitioner would always be under a reasonable apprehension that the CMD or his nominee would be favourably inclined to the Appellant. In support of the aforesaid submission, reliance was placed on the judgments rendered by the Hon''ble Supreme Court in Indian Oil Corporation Ltd. and

Others Vs. Raja Transport (P) Ltd., ; Denel (Proprietary Limited) Vs. Bharat Electronics Ltd. and Another, and Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence, . After discussing the entire gamut of case law cited by the parties, the Supreme Court opined:

34. I am also not much impressed by the submission made by Mr. Bhat that this Court is bound to appoint the Chairman-cum-Managing Director or its nominee as the arbitrator in view of the arbitration clause....

38. In Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Limited (supra), a three Judge bench of this Court reiterated the general principle as noticed in the judgments relied upon by Mr. Bhat. At the same time, it is emphasised that in exercise of its powers u/s 11(6) of the Act, the Court has to take into consideration the provision contained in Section 11(8) of the Act. The aforesaid provision requires that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator....

39. In Indian Oil Corporation Limited & Ors. vs. Raja Transport Private Limited (supra), this Court whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure, has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same....

40. In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum-Managing Director or his designate. This Court would have the power to appoint a person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial....

17. On the basis of the foresaid decision, learned senior counsel contended that the present case was a fit case for deviation from the norm of appointment of arbitrator by the Managing Director or his nominee, since the independence of the arbitrator is in question. He concluded by saying that the contention of the Respondent that the Managing Director of the Respondent, which was a Public Corporation, had changed several times over since the passing of the termination order and hence there was no basis for the apprehension of the Petitioner with regard to the impartiality of the arbitrator, was wholly misplaced. Merely because the Managing Director had since changed and another person had stepped into the shoes of the Managing Director, justice could not be expected to be rendered by the new appointee as there was bound to be continuity with regard to the decision making process and the Managing Director whosoever it may be was not likely to be uninfluenced by the decision taken by his predecessor.

18. Mr. Bijender Chahar, learned senior counsel for the Respondent, contended at

the outset that the appointment was not made by the Respondent Corporation in view of the stay order passed by this Court in the proceedings u/s 9 of the Act, which order was passed on 17.11.2009 and continued to subsist till 17.10.2011. The appointment was made soon thereafter on 21.02.2012. The petition itself had been filed during the subsistence of the interim order on 20th April, 2010.

19. Learned senior counsel for the Respondent placed reliance upon the judgment of this Court in Engineering Development Corporation Vs. MCD and Another , and in particular on paragraph 7 of the said judgment, which reads as under:-

7. The receipt of notice by the party who is called upon to appoint an arbitrator in consonance with the arbitration clause, has to be a notice properly containing complete particulars and duly received by the party. This is for the reason that a definite benefit accrues to a petitioner to claim substitution of the arbitrator by the process of the court on the ground that the other party has defaulted to comply with the terms of the arbitration clause despite the notice having been received by it. The obvious consequence in law is that instead of a nominated arbitrator, the applicant is entitled to have an independent arbitrator through the process of the court. This advantages accrues to the applicant because of default. Thus, it is important that there is strict compliance to the provisions of Section 11(1) and 11(6) of the Act. Secondly, the onus lies upon the applicant to show that he has complied sincerely with the requirements which are condition precedent to maintain such a petition.

20. Counsel also relied on the following dicta enunciated by the Supreme Court in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, , delineating the distinction between petitions for appointment of arbitrators under Sub-Section (6) on the one hand and Sub-Sections (4) and (5) of Section 11 on the other hand. In the said case, the contention of the Appellant before the High Court was that since the appointment of arbitrator had been made by the Respondent after the filing of the petition u/s 11(5) and (6) of the Act, the nominated person, i.e., the Director (Marketing) ceased to have any right to appoint any arbitrator after the expiry of 30 days from the notice invoking arbitration received by it. The learned Single Judge after examining the matter came to the conclusion that it cannot be said that the Appointing Authority did not act with due dispatch and held that as per the terms of the agreement the question with regard to the independence and objectivity of the arbitrator can be examined in view of the agreement and it was observed that this question can be raised before the arbitrator and even if they fail, it can be agitated u/s 34 of the Act. The Supreme Court while dismissing the appeal observed as under:-

13. It may also not be out of place to mention that we are aware of the Departmental lethargy in making appointment of arbitrators in terms of the arbitration clause. Therefore, mandamus can be issued by the Courts in exercise of powers u/s 11(6) of the Act but the demand should be in the event of failure

by the authorities to appoint arbitrators within the reasonable time. Courts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration clause. But in large number of cases if it is found that it would not be conducive in the interest of parties or for any other reasons to be recorded in writing, choice can go beyond the designated persons or institutions in appropriate cases. But it should normally be adhered to the terms of arbitration clause & appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name.

14. In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent-BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application u/s 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.

21. Learned senior counsel also relied upon the judgments of the Supreme Court in Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., and Union of India (UOI) Vs. Premier Files Ltd., .

22. In the case of Indian Oil Corporation Limited and Others vs. Raja Transport Private Limited (supra), the Supreme Court opined that "If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he can not subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party."

23. In the case of Union of India vs. Premier Files Limited (supra), while an application for appointment of an arbitrator was pending before the High Court, another arbitrator was appointed by the Appointing Authority. By the impugned order, the High Court disposed of the said application filed by the Respondent appointing a Senior Advocate of the Calcutta High Court as an arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996. Feeling aggrieved, the Union of India filed a Special Leave Petition. The Hon"ble Supreme Court held that the appointment of a lawyer arbitrator in the matter was in violation of the provisions of Clause 25 of the agreement, which clearly stated that the arbitrator must be appointed by the Competent Authority.

24. Learned senior counsel for the Respondent contended that though no notice

invoking arbitration had been received by the Respondent, an arbitrator had nevertheless been appointed by the Respondent as soon as the stay order passed by this Court in the proceedings u/s 9 of the Arbitration and Conciliation Act initiated by the Petitioner was vacated on 17.10.2011. The appointment was made on 21.02.2012 and thus it cannot be said that the approach of the Respondent was lackadaisical. The petition, therefore, deserved to be dismissed.

25. This Court has carefully considered the respective contentions of the parties and the decisions cited at the bar. At the outset, it may be recorded that there is no reason to suppose that the courier receipt filed by the Petitioner is a fabricated document and on the other hand, there is every reason to presume from the courier receipt that the notice invoking the arbitration was duly served upon the Respondent, for, the agreement between the parties had been abruptly terminated by the Respondent vide letter of termination dated 24th September, 2009 and a petition u/s 9 of the Arbitration and Conciliation Act, 1996 was instituted by the Petitioner soon thereafter. In such a situation for the Petitioner to invoke arbitration by sending notice thereof to the Respondent would be the natural outcome of the termination letter.

26. The reliance placed by the counsel for the Respondent on the judgment of this Court in Engineering Development Corporation vs. MCD & Anr. (supra) is also misplaced. In the said case it was observed that the Petitioner had "not even cared to file on record the acknowledgment of the said notice which is stated to have been sent through courier.....Having failed to discharge this preliminary onus, the Petitioner cannot take advantage of the reference of the provisions of Section 11(6) of the Act so as to disable the other side from exercising its right to appoint the arbitrator." In the present case, the Petitioner has placed on record the acknowledgment from the courier and has thereby discharged the preliminary onus placed upon it for taking advantage of the provisions of Section 11(6) of the Act. There is no rebuttal from the side of the Respondent except a bald statement to the effect that the courier receipt is a fabricated one.

27. The contention of the Respondent's counsel that an arbitrator could not be appointed by the Respondent in view of the stay order passed by this Court on 17.11.2009 which continued to subsist till 17.10.2011 is also wholly untenable. Suffice it to state that a bare glance at the order dated 17.11.2009 is enough to show that what was stayed was only the termination of the agreement between the parties and not the appointment of an arbitrator to adjudicate upon the disputes between the parties. For the sake of ready reference, the relevant portion of the said order is reproduced hereunder:-

...Pending further orders, subject to the service of notice along with a copy of this order and full set of paperbook on the respondents not later than two weeks from today, the operation and effect of the order of termination order/letter No. 7546/ZM/GZB/Food-Plaza/2009 issued by the respondent No. 3 and the consequent letter No. 2230 FA(1)/09-240 FA/07-08/- issued by the respondent

No. 4 directing the appellant to stop all activities shall remain stayed. We further direct that all the arrears shall be deposited by the appellant in this Court and the current dues shall continue to be paid to the respondent.

A copy of this order be given dasti to the counsel for the appellant, as prayed.

28. In view of the aforesaid, I find merit in the submission of Mr. Jayant Bhushan that the appointment of the arbitrator made by the Respondent two years after the filing of the present petition, and that too of their own Managing Director, who had been part of the decision making process which resulted in the termination of the agreement of the Petitioner, would be violative of the principles of natural justice. Such an arbitrator cannot be perceived to be impartial and the very purpose of his appointment being to ensure a fair and impartial adjudication of the disputes between the parties would stand frustrated thereby.

29. The reliance placed by the Respondent's counsel on the case of Ace Pipeline Contracts Pvt. Ltd. vs. Bharat Petroleum Corporation Ltd. (supra) is also misplaced, for in the said case the Hon'ble Supreme Court has categorically laid down that though Courts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration Clause, but in a large number of cases "in the interest of the parties or for any other reason to be recorded in writing, choice can go beyond designated persons or institutions in appropriate cases."

30. The ratio of the decision in Indian Oil Corporation Limited & Ors. vs. Raja Transport Private Limited (supra) is also to the same effect. In paragraph 48 of the said judgment, it has been observed by the Supreme Court as under:-

If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

31. The decision of the Supreme Court rendered in Union of India vs. Premier Files Limited (supra) is also of no avail to the Respondent. In the said case, the undisputed position was that when the application for appointment of an arbitrator was pending before the High Court, another arbitrator was appointed by the Appointing Authority and in fact the said arbitrator had already entered reference and proceeded with the arbitration. This being so, the Court held that the appointment of a lawyer arbitrator in the matter would not be justified at that stage, more so as the arbitrator appointed by the Appointing Authority had been appointed in substitution of the earlier arbitrator appointed by it who had resigned. The facts of the said case are thus wholly inapplicable to the facts of the present case and bear no similarity to the facts in the instant case.

32. In the instant case, the Respondents, for reasons best known to them, did

not choose to appoint an arbitrator for two years after the filing of the present petition. Thus, even assuming that no formal notice u/s 11(6) of the Act was served upon the Respondents and treating the present petition as notice for appointment of an arbitrator, there appears to be no justification for the Respondents' lackadaisical approach in not appointing an arbitrator for a period of two years after being called upon to do so. I have, therefore, no hesitation in holding that the Respondents have lost their right to appoint an arbitrator in the instant case and appointment of an arbitrator at the eleventh hour by the Respondents appears to be an attempt to pre-empt the appointment of an independent arbitrator by the Court. Such an attempt being violative of the principles of natural justice cannot be countenanced, more so as it is the Managing Director of the Respondent No. 1 Corporation who has been appointed as arbitrator, being the very same person/authority, who had caused the termination of the agreement between the parties and the resultant disputes inter se the parties.

33. In view of the aforesaid, the prayer of the Petitioner for appointment of an independent arbitrator appears to be wholly justified. This Court accordingly appoints Mr. Justice Arijit Pasayat, Retired Judge of Supreme Court to adjudicate upon the disputes between the parties. The arbitrator shall fix his own fees which shall be shared equally by the parties. ARB. P. 113/2010 stands disposed of in the above terms.